



STATE OF INDIANA

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March 30, 2012

Greg Bowes
6311 E Westfield Blvd
Suite 205
Indianapolis, IN 46220-1791

*Re: Informal Inquiry 12-INF-11; Marion County Board of Voter Registration
and Election Board*

Dear Mr. Bowes:

This is in response to your informal inquiry regarding the Marion County Board of Voter Registration ("Voter Registration") and Election Board ("Board") filed with the Public Access Counselor's Office on March 15, 2012. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Myla Eldridge, Director of Elections, and Andrea Brandes Newsom, Chief Deputy Corporation Counsel, responded to your informal inquiry.

BACKGROUND

Your informal inquiry addresses two public records requests that you submitted to Voter Registration. On January 6, 2012, you requested a computer data file that included voter registration data. On March 5, 2012, you made a similar request that also sought two additional fields to be included in the data file. Each of the requests was made in person, and with each request you were asked to fill out the respective form utilized by Voter Registration for records requests, which you thereafter complied.¹

The Board responded to your January 6, 2012 request on January 9, 2012 and provided that the Board was currently evaluating your request and that it would proceed accordingly. On March 7, 2012, David Lichtenberg, Attorney, advised you in writing that:

¹ In your initial informal inquiry, you also asked for an informal opinion regarding your request to inspect certain VRG-7 forms. On March 20, 2012, you submitted correspondence to our office which provided that Mr. Lichtenberger had assisted you with your request to inspect the paper copies of the 250 most-recently data entered VRG-7 forms. You have advised that you are satisfied with his response and assistance with the inspection process. As such, I will not address the issues raised in your original request for informal inquiry regarding Voter Registration's response to your request to inspect certain VRG-7 records.

“As you may know, Ind. Code § 3-7-26-6(c) provides that a county voter registration office shall provide duplicate copies of voter registration information maintained on a computerized system in accordance with a “nondiscriminatory uniform policy adopted by the county election board”. No such policy has been adopted by the Marion County Election Board. Consequently, the Marion County Board of Voter Registration is unable to fulfill your records request until such time as the requisite policy is established.”

You were informed by LaDonna Freeman, Democratic Voter Registration Member on January 6, 2012 that Marion County had just changed its precinct boundaries and it would take several weeks to alter the data to reflect the correct precinct information for each voter. She asked, and you agreed, to wait to receive the updated precinct information. The data updates were completed sometime near the end of February or the beginning of March, at which time you submitted your March 5, 2012 request.

On March 6, 2012, the Voter Registration responded to your March 5, 2012 request in writing and advised that you would be contacted upon the information becoming available. You have spoken at length with Ms. Newsom regarding your requests, but as of March 7, 2012 you have not heard anything further from Voter Registration.

You challenge the adequacy of the Voter Registration’s responses to your record requests. You were able to receive data from an identical January 2009 request within 24 hours after describing the request to a prior Voter Registration member. You believe that saying a request is under review is a denial in disguise and at least an unreasonable delaying providing public information. The improper delay may violate I.C. § 5-14-3-3(g) which states, “Except as provided by law, a public agency may not adopt a rule or procedure nor impose costs or liabilities that impede or restrict the reproduction or dissemination of any public record.”

You also inquire whether it is proper for an agency to issue a denial without identifying the name and the title of position of the person responsible for the denial pursuant to I.C. § 5-14-3-9(c)(2)(B). With regards to Attorney Lichtenberger’s March 7, 2012 response, no person in the public agency is identified and you do not believe that it is appropriate to use Attorney Lichtenberger’s name, as he is a lawyer acting in a representative capacity.

In your January and March 2012 requests for the computer file, you provide that you signed the Voter Registration’s form that contains the statement required by I.C. § 3-7-27-6(d). The information on the computer file is not confidential. Every field you have identified, with the exception of voter history, came from the voter registration form, which is public. You did not ask for any social security number information and sought nothing showing the source of the registration, which might be confidential under

state and federal law. The information you sought does not fit into any of the types of information listed in I.C. § 5-14-3-4(b), which would provide the Voter Registration with discretion whether to provide the records.

As to whether the Voter Registration responded to your requests in a reasonable time, you note that the computer file was produced to you upon request in 2009 within 24 hours. The ability to create reports from the voter registration is mandatory pursuant to I.C. § 3-7-26.3-29. You allege that the Voter Registration's computer system is fully capable of generating the report that was sought. As such, any delay beyond a few days would be unreasonable.

In Mr. Lichtenberger's March 7, 2012 response, he cited to I.C. § 3-7-27-6(c) to suggest that the law prohibits the Voter Registration from releasing any computer records because the Marion County Election Board ("Board") has not adopted a policy under the statute. You have confirmed that the Board has not adopted any such policy. You disagree with the Voter Registration's argument, initially in that I.C. § 5-14-3-1 provides a presumption in favor of public disclosure and imposing a duty on the agency to show why denial would be legally appropriate. Also, I.C. § 5-14-3-4(f) provides that an agency may not adopt a rule or produce that creates an exception from disclosure under this section based upon whether a public record is stored or accessed using paper, electronic media, magnetic media, optical media, or other information storage technology." Thus, the Voter Registration is not allowed to restrict access to its records on its own volition. I.C. § 3-7-27-6(c) creates an exception to the normal policy of disclosure. With an adopting policy restricting access, Voter Registration has no authority to make the public information confidential. You further provide that Voter Registration has already given the computer data file to other people, including yourself and the *Indianapolis Star*. Voter Registration may not pick and choose who receives access to the information.

In response to your request for informal opinion, Ms. Eldridge provided that the Board is a separate legal entity from Voter Registration. Therefore, the Board does not have the authority to respond to request for records maintained by Voter Registration. Ms. Eldridge also confirmed that the Board has not adopted any such policy regarding voter registration records since January 1, 2007, the state of Marion County Clerk Beth White's administration. The Board does not have complete information regarding Board action prior to that date.

Ms. Newsom responded to your inquiry on behalf of Voter Registration. As an initial matter, Voter Registration would submit that it timely responded to each of your public record requests. Further, Voter Registration acknowledges that your informal inquiry concerns two records requests voter registration information maintained on a computerized system.

Voter Registration timely acknowledged your January 6, 2012 and March 6, 2012 request for records. In Mr. Lichtenberger's response, he referenced the requirements of I.C. § 3-7-27-6(c), specifically noting that a county voter registration office shall provide duplicate copies of voter registration information maintained on a computerized system

in accordance with a “nondiscriminatory uniform policy adopted by the county election board.” Mr. Lichtenberger advised you that no such policy had been adopted by the Board and that Voter Registration was unable to fulfill the request until such policy was adopted. Mr. Lichtenberger provided that your request was not being denied, but rather Voter Registration could not respond more specifically until a condition precedent required by statute was fulfilled by the Board.

Voter Registration is obligated to comply with the requirements of I.C. § 3-7-27-6(c) and feels strongly that without authority to act further in providing or denying access to copies of the electronic records that had been sought until such time as a nondiscriminatory uniform policy is adopted by the Board. Voter Registration is aware of your allegation that you received electronic voter registration previously as a result of a 2009 request and that similar electronic data has been provided to other individuals. Nonetheless, it would appear that until it had an opportunity to review the applicable statutes upon receipt of your request, Voter Registration was unaware of its obligation to respond to such request in accordance with a nondiscriminatory uniform policy adopted by the Board.

Voter Registration firmly believes that the requirements of I.C. §§ 5-14-3-1 and 5-14-3-4(f) are critical for maintain access and transparency. Nonetheless, Voter Registration records maintained on a computerized system constituted a list under I.C. § 5-14-3-3(f), and Voter Registration is obligated to provide public access to that list unless prohibited by law. The necessity that a condition precedent (e.g. adoption of a nondiscriminatory uniform policy by the Board) be fulfilled before Voter Registration can finalize a response to the electronic records request has the effect of creating a temporary prohibition under Indiana law, and Voter Registration is bound to suspend action under the Board takes formal Action. Furthermore, I.C. § 5-14-3-3(h) provides that, “If this section conflicts with IC 3-7, the provisions of IC 3-7 apply.” Voter Registration thus has no choice but to wait for further action and establishment of a policy for computerized registration information by the Board consistent with I.C. § 3-7-27-6(c).

In reply to the Board and Voter Registration’s response, you allege that the I.C. § 3-27-7-6(c) create an exception to the general rule provided in I.C. § 5-14-3-1, rather than a condition precedent. A condition precedent is an event, condition, or act, without which another action would not be allowed. To set up a condition precedent, one would expect to see works such as “unless”, “until”, or “before.” I.C. § 3-27-7-6(c) has not such limiting words. You further provide additional case law reflecting this belief, particularly *Hedges v. Rawley*, 419 N.E.2d 224, 227 (Ind. Ct. App. 1981); *State ex rel. Family & Soc. Servs. Admin v. Estate of Philip Roy*, 2012 Ind. App. LEXIS 77 (Ind. Ct. App. 2012); *Neely v. State*, 305 N.E.2d 434 (1974).

Similar to *Neely*, where the Supreme Court has the power to create rules of criminal procedure, I.C. § 3-27-7-6(c) allows the Board to create a rule limiting the type of public information that Voter Registration may give out. The normal rules of disclosure provided in I.C. § 5-14-3 should apply until the Board adopts such a policy

pursuant to I.C. § 3-27-7-6(c). To reinforce the analysis, one should look carefully to the intent of I.C. § 3-27-7-6(c), which you believe does not allow the Board to limit what public information is to be made available. The statute does not allow the Board to expand what should be disclosed by deeming otherwise confidential information to be public. Because it allows the Board only to limit disclosure, it must be viewed as an exception to the normal guidelines set out in I.C. § 5-14-3-1. Because it is an exception, it cannot be a condition precedent.

This analysis is supported by I.C. § 5-14-3-4(g) which states, “a public agency may not adopt a rule or procedure not impose costs or liabilities that impede or restrict the reproduction or dissemination of any public record.” I.C. § 3-27-7-6(c) allows only the Board to limit disclosure of otherwise public information. To allow Voter Registration to refuse to disclose public information when the Board has not chose to limit disclosure would violate I.C. § 5-14-3-4(g).

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Board and Voter Registration are public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Board’s and Voter Registration’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable

information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Here, Voter Registration responded to your January 6, 2012 and March 5, 2012 request on January 9, 2012 and March 6, 2012. As such, it is my opinion that Voter Registration timely acknowledged your requests pursuant to the timelines provided in section 9(b) of the APRA. It is also my opinion that Voter Registration complied with the requirements of section 9(c) when Mr. Lichtenberger provided his name and title in denying your request for records on March 7, 2012. The APRA does not require that a specific public employee or public official issue a denial on behalf of the agency. Section 9(c) provides that the name and title or position of the person responsible for the denial must be provided. As Voter Registration provided in writing the name and title of the person responsible for your denial, it complied with the APRA.

As to whether Voter Registration responded to your January 6, 2012 request within a reasonable period of time; it did not issue its denial until approximately sixty-one days after your original request on March 7, 2012. Although I am mindful of the other duties required of Voter Registration and its obligation to regulate any material interference with the regular discharge of its functions, I do not believe from what has been provided that it met its burden in showing that it responded to your request in a reasonable period of time. As to your March 5, 2012 request, I do not believe you actually received a response from Voter Registration, beyond the March 6, 2012 acknowledgement, prior to filing your request for informal inquiry with our office on March 15, 2012. If Voter Registration has now provided a denial or disclosed all records that are responsive to your March 6, 2012 request, it is my opinion that it did respond to your latter request in a reasonable period of time.

As referenced by you and Voter Registration, a similar factual scenario involving the Madison County Election Board and Board of Voter Registration was addressed by the Public Access Counselor in a 2007 advisory opinion ("Madison County"). *See Opinion of the Public Access Counselor 07-FC-284*. Counselor Neal provided the following analysis:

"Here, the Board has indicated the MCEB has not yet adopted a policy either permitting or not permitting a person to duplicate or obtain a duplicate copy of the disk you have requested. While the general presumption of the APRA is that records are disclosable unless an exception to disclosure is applicable (I.C. §5-14-3-3), this more specific

statute (I.C. §3-7-27-6(c)) regarding the adoption of a policy applies to the voter registration disk you request. As such, the MCEB would need to adopt a policy regarding a requester's ability to obtain a copy of the disk. It is my opinion that the county election board may not refuse to adopt a policy as a way to avoid addressing a request for a copy of the information. But as I understand it here, the MCEB may not have realized the need to adopt a policy under I.C. §3-7-27-6(c), as the county and all counties in Indiana are still adjusting to the new statewide voter registration system. Further, it is my understanding the Board has now notified the MCEB of the need to adopt a policy so the Board may address your request and other similar requests. Pursuant to I.C. §3-7-27-6(c), the MCEB may adopt a policy granting access to a copy of the disk or denying access to a copy of the disk." See *Opinion of the Public Access Counselor 07-FC-284*.

I would agree with Counselor Neal's analysis, in that the Board would be required to adopt a nondiscriminatory uniform policy pursuant to I.C. § 3-7-27-6(c) prior to Voter Registration being able to fulfill your request. I.C. § 5-14-3-3(h) would provide further support to this position, as it provides to the extent I.C. § 5-14-3 conflicts with I.C. 3-7, the provisions of I.C. 3-7 apply. I.C. § 5-14-3-3(g) provides that, "Except as provided by law, a public agency may not adopt a rule or procedure nor impose costs or liabilities that impede or restrict the reproduction or dissemination of any public record." I do not believe Voter Registration has adopted any rule or procedure, nor has it imposed costs or liability to impede your access to the records that are sought. Voter Registration is complying with the requirements of the Indiana Code found in I.C. § 3-7-27-6(c) and I.C. § 5-14-3-3(h) in responding to your request. Until the Board takes action in adopting a nondiscriminatory uniform policy pursuant to I.C. § 3-7-27-6(c), Voter Registration is unable to process your request.

I would point out two troubling factual discrepancies with the issues that you have presented as compared to Madison County. In Madison County, there was no indication that the information that was sought was previously disclosed by Voter Registration in response to prior records requests. Here, it has not been disputed that Voter Registration has previously provided this information to you in 2009 and to the *Indianapolis Star*. Voter Registration has provided that it was unaware of its obligation to respond to such requests in accordance with a nondiscriminatory uniform policy adopted by the Board. As I am sure Voter Registration is aware, it needs to be mindful of all applicable statutory requirements of the agency in responding to requests for records pursuant to the APRA.

Second and most troubling, is that the Board has taken no action to address the adoption of a nondiscriminatory uniform policy since at least 2007. Ms. Eldridge stated the following in a March 2, 2012 e-mail:

"I apologize for not responding sooner I was researching an answer for you re: public records request policy. I learned that since before anyone can really even remember – the board has never been able to adopt either

policy addressed in the statute. Board members and the parties who appoint them understand that the statute contemplates the adoption of a policy by the Board. However, it is a procedural impossibility. There has never been a motion. Any motion would die for lack of a second. The positions of the political parties and Board members haven't changed. Nothing staff or counsel can do about it. We don't have the power to make a motion or force a vote. We work for the Board. They are the only ones with any authority."

Counselor Neal provided in Madison County that "It is my opinion that the county election board may not refuse to adopt a policy as a way to avoid addressing a request for a copy of the information." *See Opinion of the Public Access Counselor 07-FC-284.* From the information that I have before me, I can reach no other conclusion that the Board has refused to adopt a nondiscriminatory uniform policy that is necessary before Voter Registration can produce the records in response to your request. The public access counselor is not a finder of fact. *See Opinion of the Public Access Counselor 11-FC-80.* I do not have the necessary facts before me that would allow me to conclude that the Board has not adopted a nondiscriminatory uniform policy so as to avoid addressing a request for a copy of the voter registration data. I would agree with Ms. Eldridge's statement that it is the responsibility of the Board, not its employees or attorneys, to ensure such a policy is passed. As the Board is now hopefully aware of the issues presented by its lack of action, I sincerely hope that it will address the issue in the immediate future by passing a nondiscriminatory uniform policy so as to allow requests for records of this nature to be received and processed by Voter Registration.

If I can be of any further assistance to either party, please do not hesitate to contact our office.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with a large initial "J" and a stylized "H".

Joseph B. Hoage
Public Access Counselor

cc: Myla Eldridge, Andrea Brandes Newsom